



March 11, 2020

**Via E-mail**

Regional Freedom of Information Officer  
U.S. EPA, Region 4  
AFC Bldg, 61 Forsyth Street., S.W., 9th Flr (4PM/IF)  
Atlanta, GA 30303-8960  
(404) 562-9891  
E-mail: r4foia@epa.gov

**RE: Freedom of Information Act Request – Objections to issuance of NPDES permits**

To Whom It May Concern:

On behalf of the Sierra Club, I am writing to request that the United States Environmental Protection Agency (“EPA”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the EPA regulations at 40 C.F.R. § 2.100, *et seq.*

The Sierra Club is the nation’s oldest environmental organization. It has approximately 800,000 members nationwide and is dedicated to the protection and preservation of the natural and human environment. The Sierra Club’s Beyond Coal Campaign is dedicated to solving the pressing environmental and health problems associated with the mining, burning and disposal of coal and its combustion by-products.

**Records Requested and Definitions**

The Sierra Club asks that EPA provide any and all records relating to any objection issued by EPA under 33 U.S.C. § 1342(d)(2) and/or 40 C.F.R. § 123.44 to issuance by the Tennessee Department of Environment & Conservation of NPDES permit TN0070408 for Davis Creek Energy, LLC’s Area 6 Mine. If no such objection was issued, I would appreciate prompt notification of that fact.

For the purposes of this request, the term “records” means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents,

databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the EPA or any of its offices nationwide.

### **Exempt Records**

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

### **Fee Waiver Request**

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). The Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and have routinely received fee waivers under FOIA.

The Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, Sierra Club intends to use the requested information to inform the public, so the public can meaningfully participate in the identification, stabilization and remediation of hazards associated with coal combustion waste disposal.

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to EPA’s assessments and determinations regarding issuance of a Clean Water Act discharge permit. These determinations and the policies and procedures on which they are based are unquestionably “identifiable operations or activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of your agency’s decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the potential for surface coal mines to generate harmful pollution, it is important for information relating to government operations or activities involving such permits to be made available to the public. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency’s decision-making process with regard to the permit.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

As described above, Sierra Club and its members have a longstanding interest and expertise in the subject of the environmental impacts of coal mining. More importantly, Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

The Sierra Club intends to disseminate the information they receive through FOIA regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on the organizations’ websites, emailing and list-serve distribution to members.

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently little or no information publicly available regarding any concerns or objections EPA may have raised regarding this NPDES permit. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private interests involved. The records requested will contribute to the public understanding of the government's role, or their "operations and activities" associated with this critically important information.

The disclosure of the requested records is also essential to public understanding of EPA's assessment of the impacts that pollution from coal mines may have on their communities and homes and the broader environment, including but not limited to threats to human dwellings and drinking water sources. After disclosure of these records, the public's understanding of this problem will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club has no commercial interest in the requested records. Nor does the Sierra Club have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. The Sierra Club is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club's mission to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Sierra Club has no commercial interest in the requested records. Disclosure of this information is not "primarily" in the Sierra Club's commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of the environmental impacts of coal mining, and EPA's attention to these issues.

We respectfully request, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

## **Record Delivery**

In responding to this request, EPA should comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552, (a)(6)(A)(i); 40 C.F.R. § 2.104. We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552, (a)(6)(A)(i); 40 C.F.R. § 2.104. Failure to comply within the statutory timeframe may result in Sierra Club taking additional steps to ensure timely receipt of the requested materials.

Please produce the records on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

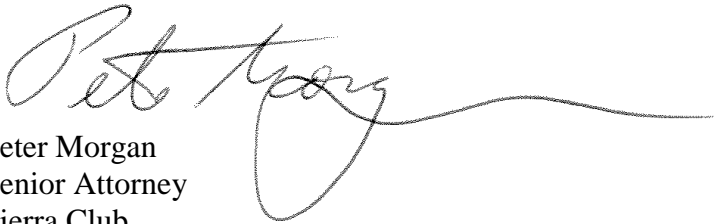
Please provide all requested records in electronic format as soon as possible to:  
peter.morgan@sierraclub.org

If any responsive record is not available in electronic format, please mail any hard copies to:

Peter Morgan  
Sierra Club  
1536 Wynkoop St., Ste. 200  
Denver, CO 80202

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at 303-454-3367 or by e-mail at peter.morgan@sierraclub.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter Morgan', with a long, sweeping horizontal line extending to the right.

Peter Morgan  
Senior Attorney  
Sierra Club  
1536 Wynkoop St., Ste. 200  
Denver, CO 80202